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# OFFICIAL IMMUNITY AND THE CIVIL RIGHTS ACT

William H. Theis\*

With increasing frequency in recent years, the Supreme Court has confronted an important issue: the proper scope of immunity for governmental officers in litigation under section 1983 of the Civil Rights Act.<sup>1</sup>

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1. The literature on the availability of official immunity in Civil Rights Act litigation includes: Cochran, *Civil Rights Litigation in the Fifth Circuit: Part I*, 48 MISS. L.J. 377, 399-417 (1977); Horlbeck & Harkness, *Executive Immunity and the Constitutional Tort*, 51 DEN. L.J. 321 (1974); Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 942 (1977); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 RUT.-CAM. L.J. 65 (1976); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1209-17 (1977); Comment, *Immunity of Public Officials from Liability Under the Federal Civil Rights Acts*, 18 ARK. L. REV. 81 (1964); Comment, *Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity*, 44 CAL. L. REV. 887 (1956); Note, *Liability of Public Officers to Suit Under the Civil Rights Acts*, 46 COLUM. L. REV. 614 (1946); Comment, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95; Comment, *Federal Comity, Official Immunity, and the Dilemma of Section 1983*, 1967 DUKE L.J. 741; Comment, *The Doctrine of Official Immunity Under the Civil Rights Acts*, 68 HARV. L. REV. 1229 (1955); Comment, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953); Comment, *Scheuer v. Rhodes: A Restatement of Absolute Immunity*, 60 IOWA L. REV. 191 (1974); Comment, *Civil Rights—Section 1983—Prosecuting Attorney Held Immune from Civil Liability for Violation of Civil Rights Act*, 42 N.Y.U.L. REV. 160 (1967); Comment, *Scheuer v. Rhodes; Reconciling Section 1983 Damage Actions with Governmental Immunities*, 53 N.C.L. REV. 439 (1974); Comment, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 TEMPLE L.Q. 938 (1976); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969) [hereinafter cited as *Liability of Judicial Officers*].

Treatment of immunity doctrine in a more general context includes: P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1410-23 (2d ed. 1973); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 26.01-.07 (1958, Supp. 1971); W. GELLHORN & C. BYSE, *CASES ON ADMINISTRATIVE LAW* 335-62 (6th ed. 1974); C. RHYNE, W. RHYNE & S. ELMENDORF, *TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICIALS* (1976); Davis, *Administrative Officers'*

This article will outline two approaches to this problem of statutory interpretation and will argue for the superiority of one over the other. The Court's most recent decisions will be assessed within this framework; and it will be seen that the most damning objection to them, taken as a whole, is their incoherence, despite elaborate efforts to create a contrary illusion. Where the Court is now heading has become virtually inscrutable. What follows may provide some structure and perspective for a most lamentable situation.

*TENNEY V. BRANDHOVE: A METHODOLOGY OF  
STATUTORY INTERPRETATION*

Section 1983 speaks<sup>2</sup> in such broad, all-encompassing terms that it seems to impose unqualified liability on "every person" who, under color of state law, transgresses its provisions. If immunities are to exist, they are not found in the text of the statute. The earliest decisions of the Court did nothing to dispel this appearance; it imposed liability on election officials in a series of voting cases without even mention of the considerable body of common law immunity doctrine which had grown up around these officials.<sup>3</sup> As we shall later see,<sup>4</sup> any consideration of common law notions of immunity might have produced considerable amelioration of the statutory language. In any event, if such an inquiry were mandated, the opinions have a gaping hole, given the richness of the materials available

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*Tort Liability*, 55 MICH. L. REV. 201 (1956); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303 (1959); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130 (1943); Powell, *Administrative Exercise of the Police Power*, 24 HARV. L. REV. 441 (1911).

2. 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. *Smith v. Allwright*, 321 U.S. 649 (1944), *overruling* *Grovey v. Townsend*, 295 U.S. 45 (1935); *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927). The Court had avoided the issue of judicial immunity in *Ex parte Virginia*, 100 U.S. 339 (1879).

4. See notes 35-41, 59-61, *infra*, and accompanying text.

for consideration. Indeed, as recently as 1944, the Court, in *Snowden v. Hughes*,<sup>5</sup> hinted that immunities might not be engrafted on the "every person" language. Following *Snowden*, some notable lower court opinions explicitly rejected a consideration of common law immunity doctrines and insisted on a literal application of the "every person" language.<sup>6</sup>

In 1951, the Court, under Mr. Justice Frankfurter, brought this trend to an abrupt halt. In *Tenney v. Brandhove*,<sup>7</sup> a civil action against members of a state legislature, the Court declared that the "every person" language did not work a wholesale abrogation of the immunities recognized at common law. The Congress, some of whose members now appear unworthy of the label "Radical Republicans," could not have intended such a drastic change as the elimination of legislative immunity, which the Court characterized as "well-grounded in history and reason."<sup>8</sup> Mr. Justice Frankfurter's opinion took great pains to establish the proposition that legislative immunity had "taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries."<sup>9</sup> This strong tradition, transplanted to the colonies, flourished and found eloquent expression in American law<sup>10</sup> long before and continuing up to 1871, the date of the passage of the Act. Thus, "[w]e cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."<sup>11</sup>

Clearly, the Court's holding is no literal reading of the statutory language; such a course would lead in a totally different direction.<sup>12</sup> Nor does the Court rely on direct evidence of Congressional intent as found in

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5. 321 U.S. 1, 6-9 (1944).

6. See *McShane v. Moldovon*, 172 F.2d 1016 (6th Cir. 1949); *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir.), *rehearing denied*, 152 F.2d 753 (1945).

7. 341 U.S. 367 (1951), noted in 3 *MERCER L. REV.* 221 (1951), 30 *TEX. L. REV.* 516 (1952), 20 *U. CIN. L. REV.* 511 (1951).

8. 341 U.S. at 376.

9. *Id.* at 372.

10. See, e.g., *Coffin v. Coffin*, 4 Mass. (4 Tyng) 1, 27 (1808), *quoted at* 341 U.S. at 373-74.

11. 341 U.S. at 376.

12. The criminal analogue to section 1983, 18 U.S.C. § 242 (1970), is not limited by notions of immunity. *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976). In both statutes, the language is equally plain. Significantly, the original wording of section 1983, before codification, imposed liability on "any person, . . . any . . . law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." Act of April 20, 1871, Stat. 1, ch. 22, § 1, 17 Stat. 13.

legislative history.<sup>13</sup> Rather, disbelief that Congress could have intended to act so irresponsibly generates an assumption that Congress must have intended to make no major change in a long-established and salutary doctrine like legislative immunity.<sup>14</sup>

If one has any doubts that *Tenney* required an inquiry into pre-1871 law in order to fathom the intent of Congress, *Pierson v. Ray*,<sup>15</sup> a later case upholding immunity for judges, should resolve those doubts. Explicitly noting cases<sup>16</sup> for which one can trace a genealogy dating back to 1607,<sup>17</sup> the Court declared, "Few doctrines were more solidly established at common law than the immunity of judges from liability from damages for acts committed within their judicial jurisdiction."<sup>18</sup> Hence, only a strong tradition—obviously known to the legislators and, therefore, obviously not intended to be discarded—can ameliorate the starkness of the legislative language.

Reliance on this methodology worked smoothly in *Tenney* and in *Pierson* because one might confidently discover and describe the state of pre-1871 law on the narrow issues involved. However, difficulties arise when one cannot find virtual unanimity in pre-1871 law on the immunity of a particular class of government officials. One could easily imagine a situation in which a search of pre-1871 law would reveal that the cases were mixed on the question of immunity for a particular class of officials. Perhaps even more likely, given the proliferation of government officials in the last four decades, no pre-1871 cases dealing with the immunity of a particular class of officials might be found.

Two approaches to these situations come to mind. (1) Immunity will

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13. The legislative history materials are none too promising for the support of immunity doctrine, especially beyond that for legislators. See *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub. nom. O'Shea v. Littleton*, 414 U.S. 488 (1974); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 N.W.U. L. REV. 615, 621-23 (1970); *Liability of Judicial Officers*, *supra* note 1, at 325-29.

14. Unless we indulge in the assumption that the Court intended to impose its will upon that of Congress, without any deference to the statute, the immunity described in *Tenney* must be grounded in history as well as in policy. The Court does not seem to arrogate for itself a privilege to make forays into good policy that would have been unacceptable to the 1871 legislators.

15. 386 U.S. 547 (1967).

16. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Scott v. Stansfield*, L.R. 3 Ex. 220 (1868).

17. *Floyd v. Barker*, 77 Eng. Rep. 1305 (K.B. 1607), discussed in text accompanying notes 22-24, *infra*, is the foundation of Anglo-American judicial immunity.

18. 386 U.S. at 553-54.

be granted only if the government official can demonstrate a strong tradition of immunity for government officials who bore the same title or performed the same duties. If the pre-1871 cases are mixed or non-existent, immunity will be denied. (2) Immunity will be granted whenever the official can demonstrate a strong tradition of immunity for a different class of officials performing different duties (which, with *Tenney* and *Pierson* in the background, he can likely accomplish) and, in addition, he can demonstrate that the reasons for granting immunity to the former class apply equally well to his class of officials. Even though pre-1871 law may give no clear idea of the immunity for a particular class of officials, immunity may be extended on analogous grounds to various classes of officials.

Certainly, the second of the two approaches suggested by this author, the appeal to analogy, has more surface appeal. It emphasizes intelligent assessment of the policies behind immunity doctrine, not the excavation of long-forgotten precedents, which, even if found, may be employed in a rigid fashion.<sup>19</sup> Judicial recognition that immunity doctrine can evolve would parallel the judicial recognition that the constitutional rights protected under the Act can evolve. A flexible, enlightened view of immunity would complement a flexible, enlightened view of constitutional rights.<sup>20</sup>

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19. See *Bryan v. Jones*, 530 F.2d 1210, 1215-17 (5th Cir. 1976) (Brown, Ch. J., concurring).

20. Over the past twenty years, the federal courts have greatly expanded the constitutional rights to be protected. First, they have taken traditional restraints on governmental action, recognized at common law and in the Bill of Rights, and have incorporated them into the fourteenth amendment and, from there, into section 1983. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961). And, even more radically, they have incorporated protections not known at common law. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). For a general treatment of these issues, see Henkin, "Selective Incorporation" in *Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

Indifferent to the rightness or wrongness of conduct, immunity remains a separate issue from the unconstitutionality of conduct. Hence, the methodology of immunity doctrine may plausibly differ from the method of determining whether there has been a violation of constitutional rights. The cases have not always maintained a clear distinction. See *Qualls v. Parrish*, 534 F.2d 690 (6th Cir. 1976); *Jones v. Marshall*, 528 F.2d 132 (2d Cir. 1975).

Significantly, history has a weaker force in determining whether conduct is unconstitutional than, it will be argued, in determining whether immunity should be granted. Although certain conduct, historically, might have been considered a tortious intrusion on personal or property rights, it is not necessarily unconstitutional conduct. See *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974). When the issues and the appropriate methodologies are confused, the demands of history on immunity doctrine may be facilely weakened. See *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976).

Indeed, a companion section of section 1983 mandates resort to the "common law" when the statutory framework leaves gaps to be filled.<sup>21</sup> If we are to admit that the "every person" language sets the outer boundaries of liability, but does not restrict judicially created defenses, as *Tenney* assures us, then immunity is one of those gaps to be filled by the common law, broadly conceived, not the law as it existed at a particular time.

On the other hand, an historical consideration of immunity doctrine indicates that the second approach would run counter to legislative intent. The common law as known in 1871 did not embrace a general theory of immunity, although the possibilities of such a development were by no means unconsidered. Certainly, the creation of such a doctrine could have easily been effected by the courts. Indeed, at the turn of the nineteenth century, the common law took a sharp turn toward a more generalized public officer immunity. The arguments employed on behalf of immunity were not and cannot be confined to a particular class of officials, and laid claim to an ever-increasing domain. The inherent expansiveness of immunity doctrine raises a serious problem. Although "every person" may not mean "every person," the language surely does not mean, on the other hand, "no person" or "very few persons." If the federal courts emphasize the rationale behind immunity doctrine and, in common law fashion, grant immunity whenever the analogy to judges or legislators—to take the most notable examples—can be drawn, then they may nullify the plain meaning of the statute. Unless we "freeze" the law, with 1871 as the point of deposit into cold storage, then we shall eventually reach the

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21. 42 U.S.C. § 1988 (1970) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

For commentary on this statute, see Theis, *Shaw v. Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681 (1976); Note, *Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494 (1970). See also Shaw v. Garrison, 391 F. Supp. 1353 (E.D. La. 1975), *aff'd*, 545 F.2d 980 (5th Cir. 1977).

absurd conclusion that Congress intended to grant wholesale immunity by its subtle choice of the words "every person."

#### ENGLISH COMMON LAW

English law very early recognized the absolute immunity of legislators, judges of courts of record, and jurors. Analogical efforts to establish absolute immunity for other officials met with no success. Although precedents may be found in favor of a qualified immunity for certain officials, they do not support any generalizations about the availability of even a qualified immunity in favor of government officials as a group. In any event, the real contest, if any, lay between no immunity and qualified immunity. Absolute immunity, no matter how compelling the logic might seem, was historically quite limited.

Quite early, in *Floyd v. Barker*,<sup>22</sup> the Court of Star Chamber established the immunity of grand jurors, petit jurors, and judges in proceedings in courts of record. As for the immunity of judges, the opinion rests on two reasons: (1) An action against a judge of a court of record would involve an attack on the record of proceedings in his court. Although the opinion quaintly speaks about the "sublimity" of records, it might be more straightforward to say that an appeal was considered to be the only remedy for the aggrieved suitor. Collateral actions should not subvert the integrity of the appellate process. (2) Since the judge is the personal extension of the king and charged to do justice in his name, only the king should entertain any charges against the judge. If any but the king should hear these charges, justice would be scandalized and subverted. Nevertheless, the opinion preserves the writ of false judgment to be taken against a court not of record.<sup>23</sup> Moreover, even a judge of a court of record could be held liable for acts in excess of his jurisdiction.<sup>24</sup>

After the historic pronouncement in *Floyd v. Barker* on judicial immunity, other officials sought to gain cover under the doctrine, even though they did not bear the literal title of judge. The early efforts in *Terry v. Huntington*<sup>25</sup> produced modest, innocuous results. The Court of Exchequer conceded that commissioners of excise resemble judges, but judges of courts of limited jurisdiction. If they imposed an excise on items not excisable, they exceeded their jurisdiction and lost their immunity. Obvi-

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22. 77 Eng. Rep. 1305 (K.B. 1607).

23. *Id.* at 1307.

24. See Case of the Marshalsea, 77 Eng. Rep. 1027 (K.B. 1613).

25. 145 Eng. Rep. 557 (Exch. Ch. 1680).



ously, an immunity only for acts within a jurisdiction so narrowly conceived was not a very potent defense.<sup>26</sup> And even this immunity seems to have been reserved for decision-makers whose acts were truly deliberative, that is, made after a formal taking of evidence.

Later efforts to analogize lottery officials,<sup>27</sup> the secretary of state,<sup>28</sup> and a colonial governor<sup>29</sup> to judges of courts of record met with failure. The judges were not indifferent to the possibilities of harassing suits against government officials.<sup>30</sup> Nor would they disagree that government officials other than themselves might be called upon to make decisions, based on the facts and the law, fully as difficult as those entrusted to judges.<sup>31</sup> And, finally, in most instances, procedural devices other than a suit for consequential damages were available to assure responsible decision-making. Nonetheless, the judges held firm the rigid<sup>32</sup> line of *Floyd v. Barker* against persistent efforts to transplant the absolute immunity which they enjoyed.<sup>33</sup>

There are, to be sure, crosscurrents in the stream of decisions. Opinions may be found which suggest the existence of something akin to (but not the same as) the "qualified immunity" developed in recent decisions of our Court.<sup>34</sup> In *Ashby v. White*,<sup>35</sup> plaintiff sued an election official for wrongfully refusing his vote in a parliamentary election. The Court of King's Bench refused him an action, Chief Justice Holt dissent-

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26. American courts eventually developed the "jurisdictional fact" doctrine, so that it offered little protection for the government officer. See *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891) (*per* Holmes, J.); *Davis*, *supra* note 1, at 222-27; *Jennings*, *supra* note 1, at 281-89.

27. *Schinotti v. Bumsted*, 101 Eng. Rep. 750 (K.B. 1796).

28. *Entick v. Carrington*, 17 How. St. Tr. 1029 (C.P. 1765).

29. *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1775).

30. See *Miller v. Seare*, 96 Eng. Rep. 673, 674 (C.P. 1777).

31. See, e.g., *Barry v. Arnaud*, 113 Eng. Rep. 245 (K.B. 1839); *Isaac v. Impey*, 109 Eng. Rep. 514 (K.B. 1830); *Warne v. Varley*, 101 Eng. Rep. 639 (K.B. 1795); *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1775); *Terry v. Huntington*, 145 Eng. Rep. 557 (Ex. 1680).

32. *Kemp v. Neville*, 142 Eng. Rep. 556 (C.P. 1861); *Calder v. Halket*, 13 Eng. Rep. 12 (P.C. 1840); *Garnett v. Ferrand*, 198 Eng. Rep. 576 (K.B. 1827); *Schinotti v. Bumsted*, 101 Eng. Rep. 750 (K.B. 1796); *Groenvelt v. Burwell*, 91 Eng. Rep. 1202 (K.B. 1699); *Hamond v. Howell*, 86 Eng. Rep. 1035 (K.B. 1677).

33. "The judge has truly been the pampered child of the law . . ." Gray, *supra* note 1, at 309.

34. The nature of the latter immunity is explored in the text accompanying notes 73-95, *infra*.

35. 92 Eng. Rep. 126 (K.B. 1703).

ing. A variety of reasons were given: (1) The official was a judge or "quasi a judge" (adhered to by only two judges). (2) Plaintiff had lost no protectable legal right. (3) The decision of election disputes rested solely, at least as a matter of first instance, with parliament. Holt dissented, stating on the matter of most interest for our purposes, "[i]f publick officers will infringe mens rights they ought to pay greater damages than other men, to deter and hinder other officers from the like offences."<sup>36</sup> Clearly, he rejected an expansive view of immunity for government officials.

On appeal, his position prevailed; and the House of Lords reversed King's Bench,<sup>37</sup> a decision which produced a strongly worded resolution of the House of Commons against interference with its prerogatives.<sup>38</sup> The House of Lords responded with its own resolutions.<sup>39</sup> Construing these

36. *Id.* at 137.

37. 1 Bro. P.C. 45, 1 Eng. Rep. 417 (H.L. 1703).

38. *Id.* at 47-48, 1 Eng. Rep. at 418-19.

39. *Id.* at 49-50, 1 Eng. Rep. at 420-21. Since these resolutions are not a part of the more commonly available report of the case found in 1 Eng. Rep. 417 (H.L. 1703), they are reprinted below:

That by the known laws of this kingdom, every freeholder, or other person, having a right to give his vote at the election of Members to serve in Parliament, and, *being wilfully denied* or hindered so to do, by the officer who ought to receive the same; may maintain an action in the Queen's courts against such officer to assert his right, and recover damages for the injury. 2dly, That the asserting, that a person, having a right to give his vote at an election, and, *being hindered* so to do by the officer who ought to take the same, is without remedy for such wrong, by the ordinary course of law; is destructive of the property of the subject, against the freedom of elections, and manifestly tends to encourage corruption and partiality in officers, who are to make returns to Parliament, and to subject the freeholders, and other electors, to their arbitrary will and pleasure. 3dly, That the declaring *Matthew Ashby* guilty of a breach of privilege of the House of Commons, for prosecuting an action against the Constables of Aylesbury, for not receiving his vote at an election, after he had, in the known and proper methods of law, obtained a judgment in Parliament for recovery of his damages; is an unprecedented attempt upon the judicature of Parliament, and is, in effect, to subject the law of *England* to the votes of the House of Commons. 4thly, That the deterring electors from prosecuting actions in the ordinary course of law, where they are deprived of their right of voting and terryfying attornies, solicitors, counsellors, and serjeants of law, from soliciting, prosecuting, and pleadings, in such cases, by voting their so doing to be a breach of privilege of the House of Commons, is a manifest assuming a power; to controul the law, to hinder the course of justice, and subject the property of *Englishmen* to the arbitrary votes of the House of Commons. (Resolution of March 27, 1704)

1st That neither House of Parliament hath any power, by any vote or declaration to create to themselves any new privilege, that is not warranted by

latter resolutions, English courts in later cases against election officials<sup>40</sup> drew the conclusion that the House of Lords' decision placed critical reliance on the plaintiff's allegation that defendant acted willfully. And, by "willfully," these courts meant that the defendant must act with subjective knowledge that he is violating the plaintiff's rights.<sup>41</sup> Thus, an election official might fare better than a judge of a court of limited jurisdiction. One case, with some quotable language of broad effect, carries this requirement of willfulness beyond election disputes.<sup>42</sup> However, it would unduly emphasize the exceptions over the general rule to

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the known laws and customs of Parliament. 2dly, That every freeman of *England*, who apprehends himself to be injured, has a right to seek redress by action at law; and that the commencing and prosecuting an action at common law against any *person* (*not entitled to privilege of Parliament*) is no breach of the privilege of Parliament. 3dly, That the House of Commons, in committing to *Newgate, Daniel Horne, Henry Bass, and John Paton, junior, John Paly, and John Oviatt*, for commencing and prosecuting an action at common law, against the late constables of *Aylesbury*, for not allowing their votes in election of Members to Serve in Parliament; upon pretence that their so doing was contrary to a declaration, a contempt of the jurisdiction, and a breach of the privilege of that House; have assumed to themselves alone a legislative authority, by pretending to attribute the force of a law to their declaration; having claimed a jurisdiction not warranted by the constitution; and having assumed a new privilege, to which they can shew no title by the law and custom of Parliament; and having thereby as far as in them lies, subjected the rights of *Englishmen*, and the freedom of their persons, to the arbitrary votes of the House of Commons. 4thly, That every *Englishman* who is imprisoned, by any authority, whatsoever, has an undoubted right, by his agents or friends, to apply for, and obtain a writ of *habeas corpus*, in order to procure his liberty by due course of law. 5thly, That for the House of Commons to censure or punish any person, for assisting a prisoner to procure a writ of *habeas corpus*, or, by vote or otherwise, to deter men from soliciting, prosecuting, or, pleading upon, such writ of *habeas corpus*, in behalf of such prisoner; is an attempt of dangerous consequence, a breach of the many good statutes provided for the liberty of the subject, and of pernicious example, by denying the necessary assistance to the prisoner, upon a commitment of the House of Commons, which has ever been allowed upon all commitments by any authority whatsoever. 6thly, That a writ of error is not a writ of grace, but of right; and ought not to be denied to the subject, when duly applied for, though at the request of either House of Parliament; the denial thereof being an obstruction of justice, contrary to *Magna Charta*. (Resolution of February 27, 1705).

40. See *Tozer v. Child*, 119 Eng. Rep. 1286 (Exch. Ch. 1857); *Harman v. Tappenden*, 102 Eng. Rep. 214 (K.B. 1801); *Cullen v. Morris*, 171 Eng. Rep. 741 (N.P. 1819). But see *Sterling v. Turner*, 86 Eng. Rep. 139 (K.B. 1684), *approved in* *Ferguson v. Earl of Kinnoull*, 8 Eng. Rep. 412, 423 (H.L. 1842).

41. If one studies the Lords' resolutions, reprinted in note 39, *supra*, this conclusion seems erroneous.

42. *Harman v. Tappenden*, 102 Eng. Rep. 214 (K.B. 1801).

say that government officials, apart from election officials, had even a qualified immunity.<sup>43</sup>

#### AMERICAN COMMON LAW BEFORE 1871

If one can make any generalization about American law before 1871, he would conclude that it did not favor official immunity. Judges<sup>44</sup> and legislators<sup>45</sup> received their absolute immunity, as in England; but even the United States Supreme Court, as late as 1868, was willing to grant an action against a judge of a court of record if he acted maliciously.<sup>46</sup> Most other officials, especially those in law enforcement,<sup>47</sup> were held accountable for misconduct as measured by the pertinent legal rules,<sup>48</sup> even in the difficult case of an official relying on an unconstitutional statute.<sup>49</sup> Sometimes the official's duties could be fairly demanding;<sup>50</sup> occasionally, lax in a sense difficult for us to conceive.<sup>51</sup> But, under the common view, one performed his legal duty or paid damages. Some few were held accountable for their mistakes only if they acted maliciously.<sup>52</sup> Judges were not insensitive to the hardships of official accountability; but, significantly, the leading cases granting relief from the rigors of this accountability were

43. See *Ferguson v. Earl of Kinnoull*, 8 Eng. Rep. 412 (H.L. 1842); *Green v. Buckkles-Churches*, 74 Eng. Rep. 294 (C.P. 1589). See generally Gray, *supra* note 1, at 324.

44. E.g., *Yates v. Lansing*, 5 Johns. 282 (N.Y. 1810).

45. E.g., *Coffin v. Coffin*, 4 Mass. (4 Tyng) 1 (1808).

46. *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868), which was superseded by the more traditional view in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

47. This tradition is recounted in Theis, "Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights, 59 MINN. L. REV. 991 (1975).

48. See *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865); *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80 (1836); *Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242 (1812); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Engdahl*, *supra* note 1, at 14-21; *James*, *supra* note 1, at 635.

49. If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed.

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1676 (4th ed. T. Cooley 1873). See further Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585 (1927); Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Nonaction*, 77 U. PA. L. REV. 155 (1928).

50. See *Teall v. Felton*, 1 N.Y. 537 (1848), *aff'd*, 53 U.S. (12 How.) 284 (1851), discussed in text accompanying notes 62-64, *infra*.

51. See *Dwinnels v. Parsons*, 98 Mass. 470 (1868).

52. See the cases involving school officials discussed in the text accompanying note 88, *infra*.

premised on what were conceived to be legislative modifications of the common law.

Decisions from New York provide striking examples. Although the analogy to judicial immunity was urged in *Seaman v. Patten*,<sup>53</sup> a case against a meat inspector, the court's decision clearly rests upon its conclusion that the relevant statute granted him unfettered discretion in his decision-making.<sup>54</sup> The court does not grant him immunity for tortious conduct. Rather, it finds the scope of wrong-doing rather narrow. Since the inspector has no statutory standards for judging good meat from bad, his decision to approve or disapprove meat may be reviewed only for corruptness of motivation.

Tax assessors in *Weaver v. Deavendorf*,<sup>55</sup> a leading case, are said to make "judicial determinations." They deliberate and make decisions after the presentation of evidence by the citizen, who may seek judicial review without resort to a damage suit.<sup>56</sup> However, mistakes with respect to the limits of their "jurisdiction" will lead to liability, a perilous qualification to their immunity.<sup>57</sup> And a later case stresses that the relevant statute merely charges them to use good judgment "according to the best information in their power"—not to make correct decisions as retrospectively viewed.<sup>58</sup>

*Jenkins v. Waldron*<sup>59</sup> grants immunity to voting officials. Direct precedential reliance is placed on *Ashby v. White*, the English case mentioned earlier, which also involved election officials.<sup>60</sup> And a later

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53. 2 Cai. R. 312 (N.Y. 1805).

54. *Accord*, *Wilson v. Mayor*, 1 Denio 595 (N.Y. 1845); *Vanderheyden v. Young*, 11 Johns. 150 (N.Y. 1814). Nor was the "unfettered discretion" analysis a phenomenon limited to New York. *See Ferguson v. Earl of Kinnoull*, 8 Eng. Rep. 412 (H.L. 1842); *Bassett v. Godschall*, 95 Eng. Rep. 967 (K.B. 1770). And it has respectability in other American jurisdictions. *See, e.g., Wilkes v. Dinsman*, 48 U.S. (7 How.) 89 (1849); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Downer v. Lent*, 6 Cal. 94 (1856).

55. 3 Denio 117 (N.Y. 1846).

56. *See Barhyte v. Shepherd*, 35 N.Y. 238, 251 (1866); *accord*, *Wall v. Trumbull*, 16 Mich. 228 (1867) (*per* Cooley, J.).

57. *See Mygatt v. Washburn*, 15 N.Y. 316 (1857); *People v. Supervisors*, 11 N.Y. 563 (1854). Later cases better illustrate the dangers of the "jurisdictional" exception to immunity. *Compare Williams v. Weaver*, 75 N.Y. 30 (1878), *with National Bank of Chemung v. City of Elmira*, 53 N.Y. 49 (1873).

58. *See Barhyte v. Shepherd*, 35 N.Y. 238, 253-54 (1866).

59. 11 Johns. 114 (N.Y. 1814); *contra*, *Lincoln v. Hapgood*, 11 Mass. (11 Tyng) 350 (1814); *Jeffries v. Ankeny*, 11 Ohio 372 (1842).

60. *See* note 35, *supra*, and accompanying text.

New York case<sup>61</sup> puts forth the same sort of justification found in the tax assessor cases: the citizen has a right to the best, honest efforts of the officials, not correct decisions.

That these cases rest on the nature of the discretion entrusted by statute to the officials is underlined in *Teal v. Felton*.<sup>62</sup> The plaintiff brought suit over an excessive postal rate levied by the local postmaster. Upholding the plaintiff's contention, the New York court observed that the pertinent federal statute set out the rates of postage for various classes of mail, not the rates for materials which seemed to the postmaster to fit within the various classes of mail. If Congress wished to make the postmaster the final arbiter on rates to be charged on individual pieces of mail, it should amend the statute.<sup>63</sup> Of course, the judicial view of immunity would be a false issue if the courts regularly established officials' duties in such a way that immunity would be superfluous. *Teal* indicates that the courts viewed public officers' duties and immunities as a statutory problem.<sup>64</sup>

#### AMERICAN LAW TAKES A NEW ROAD

In 1896, the Court began, perhaps even unwittingly, the attack on official accountability. In *Spalding v. Vilas*,<sup>65</sup> the plaintiff sued the postmaster-general for communicating to numerous clients of the former that, under Act of Congress, certain assignments they had made to the plaintiff might be invalid. As might have been expected, the Court found no tortious conduct in the defendant's giving an accurate statement of the law to interested parties. The plaintiff pressed further, arguing that even if defendant had not exceeded the scope of his authority, he had acted maliciously. The postmaster, it was claimed, had converted a normally

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61. *Goetcheus v. Matthewson*, 61 N.Y. 420, 434-35, 440 (1873).

62. 1 N.Y. 537 (1848), *aff'd*, 53 U.S. (12 How.) 284 (1851); *accord*, *Robinson v. Chamberlain*, 34 N.Y. 389, 395 (1866). The Supreme Court's disposition is strikingly at odds with its broad language in *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 96-98 (1845). For an assessment of *Kendall*, see Engdahl, *supra* note 1, at 47-49.

63. See 1 N.Y. at 547-49. The Supreme Court appears to take the same approach. See 53 U.S. (12 How.) at 291. Cf. *Goetcheus v. Matthewson*, 61 N.Y. 420, 434-35 (1875); *Doswell v. Impey*, 107 Eng. Rep. 61 (K.B. 1823); *Green v. Buckkles-Churches*, 74 Eng. Rep. 294 (C.P. 1589). In 1863, the Congress felt compelled to grant absolute immunity to those executing official orders in the conduct of the Civil War. 12 Stat. 755. Were the general presumption in favor of official immunity, this statute would have been unnecessary.

64. *Accord*, *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89 (1849).

65. 161 U.S. 483 (1896).

legal act into a wrongful act because of his spiteful, malicious desire to harm the plaintiff. The Court rejected this "prima facie tort" theory,<sup>66</sup> analogizing heads of executive departments to judges of courts of record. The Court, expressing the fear that later inquiry into motives would "seriously cripple the proper and effective administration of public affairs," granted absolute immunity.

This borrowed consideration, especially telling in a prima facie tort case, in which malice is the thrust of liability and can be so easily alleged but not so easily proved or dispelled, shortly thereafter took hold in a more general way in a series of decisions issuing from the District of Columbia,<sup>67</sup> where most litigation against federal officers was concentrated. If immunity was necessary to the fearless and, hence, effective performance of the postmaster's duties, so also did it become recognized as necessary for a host of other officials, even when they performed activities allegedly wrongful quite apart from any malicious motivation behind them. With the choice so limited—immunity versus no immunity—and the policy values so phrased—over-all benefit to society versus the dismissal of a very small number of meritorious claims—this development should not have proved unexpected. Thus, by 1959, in *Barr v. Matteo*,<sup>68</sup> the Court granted immunity to a federal officer holding a post much lower than cabinet rank. The rationale adopted by four members was by now familiar: not the official's rank, but the public's need for his undivided time, attention, and loyalty.<sup>69</sup>

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66. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 5 (4th ed. 1971) contains a discussion of the theory and collects the cases.

67. The cases are collected, and the trend is analyzed in K. DAVIS, *supra* note 1, § 26.01; W. GELLHORN & C. BYSE, *supra* note 1, at 348-55; Gray, *supra* note 1, at 335-42.

68. 360 U.S. 564 (1959).

69. Learned Hand has penned the most frequently quoted formulation.

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the fact of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public

This line of cases, confined to suits against federal officers, has not had great influence with state courts in their handling of claims under state law against state officers.<sup>70</sup> As mentioned earlier, it had no effect on early claims against state officers under section 1983.<sup>71</sup> When immunity doctrine was first introduced in *Tenney*, the Court proceeded on a legislative-intent approach, not on the policy-oriented approach of *Spalding*.<sup>72</sup> The cases of the 1960s and the 1970s provided an excellent opportunity to test the limits of *Tenney* and *Spalding*.

#### IMMUNITY DOCTRINE IN SEARCH OF A PATTERN

*Scheuer v. Rhodes*<sup>73</sup> presented the first opportunity to test these limits. Parents of students killed by national guard soldiers during an alleged civil insurrection sued the state governor, the president of the state university where the shooting occurred, and national guard officers and enlisted men. Plaintiffs questioned the propriety of deploying any soldiers at all, and also challenged specific unjustified acts of the soldiers.<sup>74</sup> All of these defendants had successfully claimed in the courts below an executive immunity of the *Spalding* variety.<sup>75</sup>

The Court began its analysis by observing that executive immunity, like judicial immunity, has grown through judicial, not legislative, development and that the fundamental policy consideration has been to foster independent, fearless public administration. Nonetheless, the Court seemed fully cognizant that *Spalding* leaves almost no room for official accountability. It feared that to transplant *Spalding* into section 1983 litigation would render that section meaningless, at least for the legal relief permitted by that statute. Faced with this dilemma, it reached out for what it called "qualified immunity."

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officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books.

*Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

70. See Gray, *supra* note 1, at 342-47.

71. See notes 3-6, *supra*, and accompanying text.

72. Justice Frankfurter's opinion in *Tenney* makes no mention of *Spalding*.

73. 416 U.S. 232 (1974).

74. *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972).

75. *Id.*



[A] qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.<sup>76</sup>

At any trial of plaintiffs' allegations, the standard would be applied to the governor's decision to call out the national guard and to all higher-ranking defendants' activities during the deployment of the national guard. As for "lesser officers and enlisted personnel," the jury must determine whether they acted in "good-faith obedience to the orders of their superiors."<sup>77</sup>

This qualified immunity was found consistent with the separate holding in *Pierson v. Ray*,<sup>78</sup> discussed above for its holding on judicial immunity. *Pierson* also held that a policeman could not be liable for false arrest if he had probable cause to believe that a statute had been violated and had no reason to believe that the statute would later be held unconstitutional, as had happened in the *Pierson* series of events.<sup>79</sup> *Scheuer's* reading of *Pierson* exhibits creativity of the highest order. In *Pierson* the Court dealt with a difficult application of probable cause doctrine and held that, under tightly defined criteria, an arrest might be no violation of constitutional rights even though made in reliance on a statute ultimately discovered to be unconstitutional. It did not embrace a general theory of reasonableness—diffuse and undefined—for police officers<sup>80</sup> nor, certainly, for all executive officials. Any suggestion in *Scheuer* that *Pierson* embodies a long-established common law doctrine applying to all officials is totally misleading, as reconsideration of an earlier part of this paper would demonstrate.

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76. 416 U.S. at 247-48.

77. *Id.* at 250.

78. 386 U.S. 547 (1967).

79. *Pierson* is discussed in greater detail in Theis, *supra* note 47, at 1000-05.

80. A number of courts, following the lead of the Second Circuit in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972), have adopted such a reading of *Pierson* for police misconduct cases. See Theis, *supra* note 47, at 1007-09. Significantly, the Second Circuit took this misinterpretation of *Pierson* to avoid the absolute immunity of *Spalding*.

It is a pity that, since the Court was concerned about the wholesale immunization of executive officers, it did not consider the common law materials available to the 1871 legislators. Admittedly, not many cases deal with use of military force in a setting of civilian insurrection, claimed or actual. However, it seems reasonably clear that the initial decision whether or not to use military force was not one reviewable by the courts.<sup>81</sup> On the other hand, the courts did impose rules governing *the manner* in which military force was used.<sup>82</sup> The distinction assumes some importance for the chief executive officer of a state or city: he is liable for his own misdeeds in directing the military forces once they are mobilized. On the other hand, he has no vicarious liability for all the misdeeds of military forces merely because he made an unreasonable decision to invoke their aid in the first place.

Nor might those under his control guide their conduct by an amorphous reasonableness,<sup>83</sup> including obedience to all orders, legal and illegal. Quite clearly, obedience to an illegal order or performance of an illegal act could lead to liability, regardless of good faith.<sup>84</sup>

*Scheuer* reverses these crucial propositions by suggesting that the basic decision to employ military force may result in liability for the governor and that subordinates may take cover under his orders. Viewed historically, the all-embracing test of "reasonableness" proposed by the court is both too harsh and too lenient.

Viewed as a problem of statutory analysis, *Scheuer* may suffer from the same deficiencies as *Spalding*. The Court evidently thought it had solved its problems by according all executive officers no more than its newly created "qualified immunity." Although this qualified immunity, seemingly unknown to the Court, created or assumed in that case a basis of liability where none had previously existed, it is a doctrine only slightly

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81. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Ela v. Smith*, 71 Mass. (5 Gray) 121 (1855); *Vanderheyden v. Young*, 11 Johns. 150 (N.Y. 1814); *Druecker v. Salomon*, 21 Wis. 621 (1867).

82. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Ela v. Smith*, 71 Mass. (5 Gray) 121 (1855).

83. Although military personnel may not have been bound at all times by the same principles of law applicable to civilians, there were principles of definite, albeit different, content. See *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Ela v. Smith*, 71 Mass. (5 Gray) 121 (1855).

84. See *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851); *Wise v. Withers*, 7 U.S. (3 Cranch) 330 (1806); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Johnson v. Jones*, 44 Ill. 142 (1867); *Hyde v. Melvin*, 11 Johns. 521 (N.Y. 1814).

less expansive than that found in *Spalding*. The concluding passages of the Court's opinion lay great stress upon the "good faith" of the defendants as the heart of their defense.<sup>85</sup> With so much emphasis on the defendants' good faith, the plaintiff might have an exceedingly difficult time in establishing recovery. In *Scheuer*, the governor and higher officials could easily claim that they were misled by their subordinates, even innocently, into making certain orders; the subordinates could even more easily claim they were merely following orders, which they had no occasion to question. The opinion legitimizes two of the worst failings of bureaucracy: uncritical transmission of "data"—surmise and conjecture masquerading as fact<sup>86</sup>—and uncritical obedience to orders and customary procedures. Since even under *Scheuer* some officials theoretically might be subject to liability, whether *Scheuer* comes too close to nullification of section 1983 is a question of judgment; but a sound judgment would consider nullification accomplished.

Ironically, although this conception of immunity could immunize so many persons as to make the statute meaningless, it would not preclude, as would *Spalding*, consideration of plaintiff's case in any detailed fashion. Thus, it brings the worst of both worlds, plaintiffs uncompensated for genuine wrongs and official defendants plagued with harassing suits.

Even if the *Scheuer* standard is an objective one, it too hastily and too loosely imposes a reasonableness standard on all officials. It fails to acknowledge that some officials traditionally had no duty toward some plaintiffs and, more dangerously, that other officials had a more particularized or even a more stringent duty than due care toward other plaintiffs. To return to the example of the policeman, it makes a difference whether he must arrest upon probable cause or merely be reasonable in making an arrest. Unless *Scheuer* makes no change in the law, mistaken, but not unreasonable, judgment may substitute for the judgment required by a probable cause standard. Even the latter standard, as developed in the numerous precedents, does not call for perfection in judgment. Thus, *Scheuer* seems to call for the generation of a new body of precedent, which in some vague, undefined way will impose a lesser standard upon the officer, at least in civil actions.<sup>87</sup>

The Court must have felt some difficulty with *Scheuer* because it so

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85. 416 U.S. at 250.

86. See *Oakley v. City of Pasadena*, 535 F.2d 503 (9th Cir. 1976); *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976).

87. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

quickly returned to the problem in *Wood v. Strickland*,<sup>88</sup> a suit against school administrators. Ironically, the common law view in 1871, probably influenced by the unpaid, voluntary status of many school officials, held school officials to minimal accountability. They could violate with impunity a student's legal rights unless they did so with a subjective knowledge that they were injuring him. Pre-1871 decisions stand for the proposition that school board members can be mistaken, even badly mistaken, as long as they bear no personal animus toward their charge.<sup>89</sup> Of course, the more gross their claimed ignorance, the more probable the personal animus masquerading as ignorance. But no accurate statement of pre-1871 law would place on them the duty to be aware of "settled, indisputable"<sup>90</sup> constitutional rights.

*Wood* ignored this tradition as well as the main thrust of the decision in *Scheuer* in holding that,

The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.<sup>91</sup>

That good faith is merely necessary, but not sufficient to defeat a claim is a significant change in emphasis from *Scheuer*. More importantly, *Wood* illustrates the Court's desire to make officials abide by standards more specific than *Scheuer*'s diffuse reasonableness. *Wood* tested the defendants' specific decision under a substantive due process standard akin to

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88. 420 U.S. 308 (1975).

89. See *Donahoe v. Richards*, 38 Me. 379 (1854); *Spear v. Cummings*, 40 Mass. (23 Pick.) 224 (1839); *Stephenson v. Hall*, 14 Barb. 222 (N.Y. 1852); *Stewart v. Southard*, 17 Ohio 402 (1848). Later decisions continue this trend. See *McCormick v. Burt*, 95 Ill. 263 (1880); *Dritt v. Snodgrass*, 66 Mo. 286 (1877); *McGuire v. Carlyle*, 6 Tenn. Civ. App. 51 (1917).

90. 420 U.S. at 321.

91. *Id.* at 321-22; *accord*, *Procunier v. Navarett*, 98 S. Ct. 855 (1978).

that developed in *Thompson v. City of Louisville*.<sup>92</sup> It asked whether there was support for the defendants' decision, not whether it seemed to them that they were acting reasonably.<sup>93</sup> Furthermore, the Court sent the case back to determine whether the plaintiff might have been denied a procedural due process right to a hearing, even though its opinions had not specifically accorded this right to students at the time of the challenged conduct.<sup>94</sup> Four members of the Court strenuously objected to this weakening of *Scheuer*,<sup>95</sup> and yet the language about "settled, indisputable law," if considered apart from what the Court held, could be twisted and applied so as to grant official immunity quite as broad as that found in *Scheuer*.

This tension in the *Wood* decision had not been completely explored when the Court confronted still another immunity case, *Imbler v. Pachtman*.<sup>96</sup> In *Imbler* the plaintiff alleged—and had proved in a prior suit for federal habeas corpus<sup>97</sup>—that the defendant district attorney had knowingly used perjured testimony to secure plaintiff's conviction and death sentence. A readily identifiable group of precedents generated under *Spalding* argued for absolute immunity.<sup>98</sup> On the other hand, despite their ambiguities, *Scheuer* and *Wood* had made it clear that in section 1983 litigation absolute immunity could not be freely extended beyond judges and legislators. One might reasonably have predicted a qualified immunity in this case, small comfort for a defendant who had been accused of having employed perjured testimony. Indeed, very recent decisions involving prosecutors had begun to take what seemed the message in *Scheuer-Wood* and had begun to ease away from *Spalding*.<sup>99</sup>

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92. 362 U.S. 199, 206 (1960).

93. "Given the fact that there was evidence supporting the charge . . ." 420 U.S. at 326 (Court's emphasis).

94. See Theis, *supra* note 47, at 1017.

95. 420 U.S. at 329-31.

96. 424 U.S. 409 (1976).

97. *Imbler v. California*, 424 F.2d 631 (9th Cir.), *cert. denied*, 400 U.S. 865 (1970).

98. See notes 138-44, *infra*, and accompanying text.

99. See *Martin v. Merola*, 532 F.2d 191 (2d Cir. 1976); *Hahn v. Sargent*, 523 F.2d 461 (1st Cir. 1975); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *Christman v. Hanrahan*, 500 F.2d 65 (7th Cir. 1974) (by implication); *Holton v. Boman*, 493 F.2d 1176 (7th Cir. 1974); *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972); *Briggs v. Goodwin*, 384 F. Supp. 1228 (D.D.C. 1974); *Haaf v. Grams*, 355 F. Supp. 542 (D. Minn. 1973); *Rousselle v. Perez*, 293 F. Supp. 298 (E.D. La. 1968); *Koch v. Grimminger*, 192 Neb. 706, 223 N.W.2d 833 (1974); *Cashen v. Spann*, 66 N.J. 541, 334 A.2d 8 (1975).

*Imbler* confounded these predictions by granting prosecutors absolute immunity. The Court's finding of absolute immunity might imply awesome common law "tap roots." In fact, there are none. English law granted no immunity. In truth, no case raises the narrow issue because at that time official government lawyers had very little involvement in criminal prosecutions. However, it is instructive to look at cases involving private parties as well as their lawyers.

If policy arguments in favor of absolute protection for public prosecutors have validity, they have *at least* equal strength when private citizens perform—with government encouragement—the same task.<sup>100</sup> If English law gave no absolute immunity in this context, one could hardly infer that Congress signified a substantial change with its "every person" language.

Only in relatively recent times has England created an official prosecuting authority, the Director of Public Prosecutions; and even now he takes an immediate involvement in criminal prosecutions nothing like that of an American district attorney. By and large, English prosecutions have customarily been instituted on the complaints of private citizens or police officers in their capacity as private citizens. It has been stressed that every citizen has the right and duty to prosecute crime. At the preliminary hearing level, the prosecuting witness often presented his case without professional legal assistance, although he might hire a solicitor for this purpose. Even in those cases in which the accused had been committed for jury trial upon an indictment, the court commonly appointed a barrister at the last minute to conduct the prosecution's case. Thus, in England, official government lawyers have had much less control of the criminal justice machinery than in the United States.<sup>101</sup>

A number of English defamation cases contain broad statements of an absolute privilege for parties, witnesses, and counsel.<sup>102</sup> However, the total protection against actions sounding in defamation should not obscure a sensible and vigorously applied distinction: that such persons may be liable for a malicious prosecution. The cases indicate that the law visited liability on lawyers as well as non-lawyers in this latter type of action. The

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100. Defense of a civil suit would be even more disruptive and costly for the private citizen than for the public prosecutor.

101. See R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 105-14 (1940); *accord*, *Johnson v. Emerson*, L.R. 6 Ex. 329, 372 (1871).

102. See *Munster v. Lamb*, 11 Q.B.D. 588 (C.A. 1883); *Dawkins v. Lord Rokeby*, L.R. 8 Q.B. 255 (1873); *Mackay v. Ford*, 120 Rev. R. 831 (Ex. 1860); *Hodgson v. Scarlett*, 106 Eng. Rep. 86 (K.B. 1818); *Wood v. Gunston*, 82 Eng. Rep. 863 (K.B. 1655); *Brook v. Montague*, 79 Eng. Rep. 77 (K.B. 1606).

distinction seems justified if one considers that a privilege to defame prevents a collateral attack on a prior judgment of conviction. However, since, by definition, the prior proceedings must have terminated in favor of the now plaintiff,<sup>103</sup> an action for malicious prosecution makes no attack on a judgment of conviction.<sup>104</sup>

*Floyd v. Barker* itself carries the first hint of this distinction.<sup>105</sup> Shortly afterward, the Exchequer Chamber upheld a judgment in a malicious prosecution action against the defendant who falsely attempted to procure an indictment against the plaintiff.<sup>106</sup> That same Court pressed the distinction to its furthest limit in an 1861 decision, *Fitzjohn v. Mackinder*,<sup>107</sup> where the defendant's perjury in a civil debt action set in motion an ultimately unsuccessful criminal prosecution against the plaintiff. The judge in the first civil case, believing the defendant, committed the plaintiff for trial and ordered the defendant to prosecute. In the subsequent malicious prosecution suit, the defendant argued that he had lied in order to advance his position in the civil action, not to have the plaintiff committed on criminal charges. His prosecution of the plaintiff, a role not sought but imposed on him, resulted from the judge's finding of probable cause. To this, Chief Justice Cockburn replied, "I cannot bring myself to think that the defendant should be allowed to shelter himself under an order having its origin in his own falsehood."<sup>108</sup> The defendant, relying on defamation cases, also argued that there could be no action for perjured testimony. Cockburn's reply is a classic statement of the distinction, even now recognized in England.<sup>109</sup>

[T]his is neither in form nor substance an action in respect of the perjury . . . . It is an action for preferring an indictment and carry-

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103. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 4.1-.12 (1956) for the elements of the action.

104. Failure to grasp this distinction accounts, in part, for some of the cases examined in *Imbler*. See text accompanying notes 129 & 140, *infra*.

105. See 77 Eng. Rep. 1305, 1307 (1607).

106. *Payne v. Porter*, 79 Eng. Rep. 418 (Exch. Ch. 1619); *accord*, *Mittens v. Foreman*, 58 L.J. (n.s.) 40 (Q.B.D. 1888); *Heslop v. Chapman*, 23 L.J. (n.s.) 49 (Exch. Ch. 1853); *Dubois v. Keats*, 113 Eng. Rep. 440 (K.B. 1840). *Sutton v. Johnston*, 99 Eng. Rep. 1215 (Exch. Ch. 1786), denied an action for malicious prosecution of a court-martial. However, the court's opinion makes clear that the case turns on the unusual features of military law.

107. 142 Eng. Rep. 199 (Exch. Ch. 1861).

108. *Id.* at 208; *accord*, *Johnson v. Emerson*, L.R. 6 Ex. 329, 395 (1871).

109. Compare *Roy v. Prior*, [1971] A.C. 470 (H.L. 1970), with *Marrinan v. Vibart*, [1963] 1 Q.B. 528 (C.A. 1962) and *Hargreaves v. Bretherton*, [1959] 1 Q.B. 45 (1958).

ing on a prosecution against the plaintiff on a charge which the defendant knew to be untrue, and which he knew could only be supported by perjured testimony. The perjury only comes incidentally into question as shewing that the whole proceeding was malicious and destitute of any pretence of probable cause.<sup>110</sup>

Significantly, Cockburn stresses in another portion of the opinion that prosecution may become malicious in any of its stages, whenever the prosecutor can no longer believe continuation of the prosecution justified.<sup>111</sup>

There is evidence that a similar liability for lawyers existed. Obviously, a lawyer was not vicariously liable for the malice of his client;<sup>112</sup> and the nature of an action for wrongful use of legal process would often frustrate recovery if the client had perpetrated a fraud on his own lawyer. But lawyers certainly had no immunity from malicious use of the legal machinery.<sup>113</sup> In the 1871 case of *Johnson v. Emerson*,<sup>114</sup> though the barons differed on the particular application of the general rule, they agreed that, if the defendant lawyer "acted without reasonable and probable cause and was actuated by malice he would be responsible in this action, though he acted only as an attorney."<sup>115</sup> To hold otherwise would allow him license as a "legal assassin."<sup>116</sup>

Against this background, no American decision before 1871 granted the prosecutor absolute or qualified immunity. *Parker v. Huntington*,<sup>117</sup> an 1854 Massachusetts case which received only footnote treatment in *Imbler*, has far more meaning than the Court was willing to attribute to it.<sup>118</sup> In *Parker*, the Supreme Judicial Court of Massachusetts, a leading court in the recognition of legislative<sup>119</sup> and judicial<sup>120</sup> immunity as well as

110. 142 Eng. Rep. at 210.

111. *Id.* at 209.

112. See *Brook v. Montague*, 79 Eng. Rep. 77 (K.B. 1606).

113. See *Melia v. Neate*, 176 Eng. Rep. 347 (N.P. 1863); *Stockley v. Hornidge*, 173 Eng. Rep. 377 (N.P. 1837). That these cases, involving wrongful use of legal process in a civil suit, are pertinent is explained in *Johnson v. Emerson*, L.R. 6 Ex. 329, 372-73 (1871).

114. L.R. 6 Ex. 329 (1871).

115. *Id.* at 333. Liability was imposed on the attorney by a divided court.

116. *Id.* at 368.

117. 68 Mass. (2 Gray) 124 (1854).

118. 424 U.S. at 421 n.18: "*Parker* . . . involved the elements of a malicious prosecution cause of action rather than the immunity of a prosecutor."

119. See *Coffin v. Coffin*, 4 Mass. (4 Tyng) 1 (1808), on which the Court relied in *Kilbourn v. Thompson*, 103 U.S. 168, 203-04 (1881).

120. See *Pratt v. Gardner*, 56 Mass. (2 Cush.) 63 (1848), cited in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).



a lawyer's privilege to defame in judicial proceedings,<sup>121</sup> discussed in exceedingly narrow and detailed terms and remanded for further proceedings a malicious prosecution action against the district attorney.<sup>122</sup> Since prosecutorial immunity would have provided a summary defense to allegations that the district attorney had fabricated the criminal charges against the civil plaintiff, the *Parker* court certainly pursued a tortured, arid course,<sup>123</sup> if we assume that prosecutorial immunity was an available ground of the decision. Indeed, that absolute immunity was not recognized as a defense seems a more straightforward characterization of the Massachusetts court's perception of contemporary legal principles. On an issue so important and so decisive of this case as well as many others, silence hardly indicates that the issue was an open one, as *Imbler* attempts to imply.

Indeed, as late as 1892, a standard treatise on malicious prosecution and related subjects<sup>124</sup> makes no mention of prosecutorial immunity. Likewise, an 1891 treatise on public officers<sup>125</sup> gives a full discussion of official immunities, including "quasi-judicial" immunities for a wide range of officials, but makes no mention of prosecuting attorneys. Without doubt, a lawyer had strong defenses for his conduct in initiating and

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121. In 1841, the Massachusetts court clearly recognized the defamation privilege for lawyers and witnesses established by the English cases. *Hoar v. Wood*, 44 Mass. (3 Met.) 193 (1841). There is not the slightest indication that the Court was willing to ignore the other line of cases on malicious prosecution (see notes 102-16, *supra*, and accompanying text) rooted in the same soil and intertwined with the defamation cases.

122. Impliedly, defendant-prosecutor's initial success in his criminal prosecution supplied sufficient probable cause to defeat a necessary element of plaintiff's case for malicious prosecution. See *Parker v. Farley*, 64 Mass. (10 Cush.) 279 (1852), cited by the court, 68 Mass. (2 Gray) at 128; *Bacon v. Towne*, 58 Mass. (4 Cush.) 217 (1849). Thus, the court would take a view of the elements of that tort different from courts in England, see *Fitzjohn v. Mackinder*, 142 Eng. Rep. 199 (Exch. Ch. 1861), and in California, see *Carpenter v. Sibley*, 153 Cal. 215, 94 P. 879 (1908); see note 134, *infra*. However, like these courts, it places no reliance on immunity, a doctrine which would foreclose civil suit even when the prosecutor had met with no success in the criminal proceeding.

123. The court's opinion contains a lengthy exposition of the nature of the cause of action for conspiracy and its relation to the cause of action for malicious prosecution. 68 Mass. (2 Gray) at 126-28.

124. See M. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS §§ 18-20 (1892); I.T. STREET, FOUNDATIONS OF LEGAL LIABILITY 37-38 (1906) (discusses official immunity but makes no mention of public prosecutors).

125. See F. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS §§ 636-43 (1890).

conducting criminal and civil litigation.<sup>126</sup> However, nothing so all-powerful as an immunity appears in the reports until 1896.

In that year *Griffith v. Slinkard*<sup>127</sup> adopted the novel position that a public prosecutor should receive absolute immunity. The Indiana Supreme Court's analysis merits some attention. Drawing upon dicta in a prior case<sup>128</sup> interpreting a statute forbidding bribery of officials engaged in the administration of justice, the court characterized the prosecutor as a judicial officer. Then, quoting from a textbook passage on liability for defamation,<sup>129</sup> it concluded that judicial officers had immunity for all their official activities.<sup>130</sup> *Parker v. Huntington*<sup>131</sup> was interpreted as consistent with a proposition of absolute immunity.

This remarkable decision did not gain immediate approval.<sup>132</sup> In 1908 the California Supreme Court remanded for trial allegations that a district attorney conspired to bring knowingly false charges, which resulted in a conviction, which itself was reversed on appeal.<sup>133</sup> Without mention of official immunity, the court rejected the district attorney's argument that the conviction, albeit reversed, conclusively negated want of probable cause, an essential element of malicious prosecution. The court responded,

Certainly, if a man has procured an unjust judgment by the knowing use of false and perjured testimony, he has perpetrated a great private wrong against his adversary . . . . [I]t would be obnoxious to every one's sense of right and justice to say that, because the infamy had been successful to the result of a conviction, the probable cause for the prosecution was thus conclusively established against a man who had thus been doubly wronged.<sup>134</sup>

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126. See, e.g., *Bicknell v. Dorion*, 33 Mass. (16 Pick.) 478 (1835); *Peck v. Chouteau*, 91 Mo. 138, 3 S.W. 577 (1887).

127. 146 Ind. 117, 44 N.E. 1001 (1896).

128. *State v. Henning*, 33 Ind. 189 (1870).

129. J. TOWNSHEND, A TREATISE ON SLANDER AND LIBEL § 227 (3d ed. 1877).

130. The court was seemingly unaware of the English doctrine discussed in the text accompanying notes 102-16, *supra*. Nor was this doctrine local to England, see *Hastings v. Lick*, 22 Wend. 410, 417 (N.Y. 1839).

131. 68 Mass. (2 Gray) 124 (1854), discussed in text accompanying notes 117-23, *supra*.

132. See *Arnold v. Hubble*, 18 Ky. L. Rep. 947, 38 S.W. 1041 (1897).

133. *Carpenter v. Sibley*, 153 Cal. 215, 94 P. 879 (1908).

134. *Id.* at 218, 94 P. at 880. Some years later, an intermediate appellate court in California, facetiously characterizing *Sibley* as a case that left the issue of prosecutorial immunity as undecided, upheld such immunity. *Pearson v. Reed*, 6 Cal. App. 2d 277, 286, 44 P.2d 592, 596 (1935). This is, of course, similar to the approach taken by the Court in *Imbler*. See note 118, *supra*, and accompanying text.

Decisions in Hawaii<sup>135</sup> and in Minnesota<sup>136</sup> also refused to grant the prosecutor an absolute immunity.<sup>137</sup>

Prosecutorial immunity, however, eventually took hold in four states.<sup>138</sup> It gained momentum, when, in 1926, the Second Circuit Court of Appeals, stressing defamation cases, but failing to reconcile them with malicious prosecution cases,<sup>139</sup> approved the doctrine in *Yaselli v. Goff*,<sup>140</sup> a suit against a federal prosecutor. The decision was summarily affirmed by the United States Supreme Court,<sup>141</sup> which assured its ready acceptance by state<sup>142</sup> and federal courts,<sup>143</sup> even in section 1983 suits against state prosecutors,<sup>144</sup> where the interpretation of section 1983 makes the special demands previously indicated.

Thus, prosecutorial immunity has no "tap roots" in the centuries preceding 1871. Rather, the doctrine, especially as enunciated in *Yaselli*, fits smoothly into the pattern of federal decisions which, since the turn-of-the-century decision in *Spalding v. Vilas*,<sup>145</sup> have extended immunity to numerous officials.<sup>146</sup>

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135. *Leong Yau v. Carden*, 23 Haw. 362 (1916).

136. *Skeffington v. Eylward*, 97 Minn. 244, 105 N.W. 638 (1906).

137. *Ostman v. Bruere*, 141 Mo. App. 240, 124 S.W. 1059 (1910), although denying liability after an investigation of plaintiff's claim, makes no mention of immunity.

138. See *Smith v. Parman*, 101 Kan. 115, 165 P. 663 (1917); *Semmes v. Collins*, 120 Miss. 265, 82 So. 145 (1919); *Price v. Cook*, 120 Okla. 105, 250 P. 519 (1926); *Watts v. Gerking*, 111 Ore. 641, 222 P. 318 (1924).

139. *Yaselli v. Goff*, 12 F.2d 396, 402-03 (2d Cir. 1926).

140. 12 F.2d 396 (2d Cir. 1926).

141. 275 U.S. 503 (1927).

142. *E.g.*, *Downey v. Allen*, 36 Cal. App. 2d 269, 97 P.2d 515 (1939); *Andersen v. Bishop*, 304 Mass. 396, 23 N.E.2d 1003 (1939); *Kittler v. Kelsch*, 56 N.D. 227, 216 N.W. 898 (1927); *Anderson v. Manley*, 181 Wash. 327, 43 P.2d 39 (1935). See RESTATEMENT OF TORTS § 656 (1938). *But see* authorities in note 99, *supra*.

143. *E.g.*, *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 642, *rehearing denied*, 305 U.S. 673 (1938), 307 U.S. 651 (1939); *Anderson v. Rohrer*, 3 F. Supp. 367 (S.D. Fla. 1933).

144. *E.g.*, *Duba v. McIntyre*, 501 F.2d 590 (8th Cir. 1974); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972); *Madison v. Gerstein*, 440 F.2d 338 (5th Cir. 1971); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); *Marlowe v. Coakley*, 404 F.2d 70 (9th Cir.), *cert. denied*, 395 U.S. 947 (1968); *Fanale v. Sheehy*, 385 F.2d 866 (2d Cir. 1967); *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961), *cert. denied*, 369 U.S. 868, *rehearing denied*, 370 U.S. 920 (1962); *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959). The cases are collected in C. ANTINEAU, *FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE* § 40 (1971 & Supp. 1975).

145. 161 U.S. 483 (1896).

146. See 12 F.2d at 404 (reliance on *Spalding*).

The Court's methodology in *Imbler* bears consideration. It is so unusual that one can hardly guess what will happen in the future. The Court stressed that it must consider the immunity accorded the relevant official at common law and the interests behind that immunity. Glossing over the non-existence of prosecutorial immunity until 1896,<sup>147</sup> it recounted the twentieth-century development of this doctrine, without recognizing the influence of *Spalding*, now diminishing under the influence of *Scheuer-Wood*.<sup>148</sup> Thus, it concluded that, "historically,"<sup>149</sup> this immunity was "well-settled."<sup>150</sup> As argued earlier, it would be plausible to make a narrow inquiry into the state of immunity for each official as of 1871 and, hearkening to legislative intent, grant or deny the immunity as the common law of that vintage would have granted or denied it. But to make the existence of immunity rely on a "weight of authority" calculation limited to modern cases is hopelessly confused.

Even the Court must have realized that such an inquiry has little to do with the problem of statutory interpretation facing it, for it justified prosecutorial immunity in material part on the policy reasons which *Spalding* proposed for a general theory of official immunity.<sup>151</sup> Of course, by saying that it was making a decision on prosecutorial immunity, not immunity for all officials, the Court may have hoped that it had escaped its fear that "every person" might be transformed into "no person." And certainly it did not overrule *Scheuer-Wood*. However, if the experience under *Spalding* teaches a lesson, that lesson is the inexorable march of absolute immunity. Indeed, if the approved methodology now requires that, for each class of officials, precedents between *Spalding* and *Scheuer-Wood* be "weighed" or "counted," it will produce and continue the widespread immunity that has prevailed during most of this century for federal officials.<sup>152</sup>

#### HISTORY AT ODDS WITH POLICY?

Earlier in the article this author maintained that a narrow, historical approach to immunity would be demonstrated superior to an analogical

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147. See note 118, *supra*, and accompanying text.

148. See cases cited in note 99, *supra*.

149. 424 U.S. at 421.

150. *Id.* at 424.

151. *Id.* at 424-25: The Court also opined that prosecutorial misconduct raises issues for a lay jury which it may not be as well-equipped to handle as the issues in suits against other officials. However, it is difficult to understand why a jury, as in *Scheuer*, would not have infinitely greater difficulty in evaluating a governor's decision to call national guardsmen into action.

152. See text accompanying notes 65-69, *supra*.

approach to immunity. On one level that task has been accomplished. Appeals to broad analogy clash with the historical background of the "every person" language. The early cases provide guidance in interpreting a legislative intent not faithfully carried forward in the Court's most recent pronouncements.

Nevertheless, these recent cases evidence a judicial mentality with which we must reckon as if there were no statute on the scene. These decisions reflect a determined distaste for the imposition of liability on public officials. In the face of this determination, careful analysis of the historical background might be dismissed as pedantry insensitive to compelling policy considerations. This determination, strong enough to conjure up doubt and complexity even in the face of the most pre-emptive language imaginable, must be confronted. If widespread immunity is good policy, then it will persist regardless of the legitimate claim that it transgresses legislative intent.

Since *Scheuer*, *Wood*, and *Imbler* seem to take approaches to immunity divergent from each other as well as from Congressional intent, it is useful to examine the wisdom of each variation. *Imbler*'s absolute immunity most starkly and perhaps most coherently presents the policy considerations at issue on the immunity question. *Imbler*'s iron-clad assurance that lawsuits against the public official will be summarily dismissed grants him a latitude for the effective performance of duties deemed on the whole beneficial to society at large. Through malice, incompetence, or error in judgment, he may cause injury to a number of citizens. Yet he need not concern himself about lawsuits, which expose him to a risk of liability and thereby make less attractive a vigorous discharge of his important duties.<sup>153</sup> This utilitarian calculation ordains that a few shall suffer without redress, so that the many may realize a greater benefit. One human endeavor, the governance of society, is deemed so important that it merits a radical measure like total immunity, which, with few and ever decreasing exceptions, is denied to almost all other activities.<sup>154</sup>

Clearly, total immunity for tortious conduct defeats the ordinary aims of tort law—retribution, compensation, and deterrence.<sup>155</sup> There may

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153. See the Learned Hand formulation, quoted in note 69, *supra*.

154. The once widespread immunity of charities is now recognized in only a handful of jurisdictions. See W. PROSSER, *supra* note 66, § 133, at 994-95. Interspousal immunity, although slightly less moribund, is under increasing judicial attack. See *id.* § 122, at 863-64.

155. Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951) sets out a lucid, general survey of tort theory.

always be a legitimate difference of opinion on the value question whether fearless, effective government is worth denial of these traditional goals of tort law. The narrower criticism to be made is that a society may grant redress to wronged citizens without diminishing the appeal of public service. If the governmental employer provides full indemnity for the wrongdoing public servant, the latter may pursue vigorous action without fear of financial responsibility for his illegal actions. Nor need the citizen suffer a wrong without redress. There is no reason to forego the traditional aims of tort law when the goal of effective government may be nevertheless obtained. Total immunity constitutes an overreaction which fails to accommodate the needs of the wronged individual. It places on a few the costs of an endeavor beneficial to all.

Governmental indemnity for official misconduct, especially for intentional misconduct, may seem objectionable at first glance. The law has traditionally granted indemnity only to a party less culpable than the party paying the indemnity.<sup>156</sup> That a totally innocent party, a governmental unit, should pay indemnity to a wrongdoing official may seem somewhat novel, perhaps even shocking. Only a few states by statute grant indemnity to public officers, and then only to those who have acted in good faith.<sup>157</sup> However, this traditionally strict view of indemnity should not allow us to forget that absolute immunity, like indemnity, relieves the wrongdoer from financial responsibility, but, unlike indemnity, places the ultimate burden on the victim of the wrongdoer. If a society has granted total immunity, it has already determined to forego tort responsibility for governmental officials. Replacing immunity with indemnity represents no basic change on this issue. It merely substitutes redress for the innocent victim, who, under an immunity framework, is left to bear a burden for the good of the rest of society even though the society has the financial resources to bear that burden.

The same protection may be given the citizen if individual immunity for the official is retained, but sovereign immunity abolished and vicarious responsibility imposed. Rather than sue the individual defendant, who would obtain indemnity from his employer, the citizen would directly sue the employer, who would not be allowed to invoke an immunity personal to the employee.<sup>158</sup> Within this framework, official immunity would work

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156. See W. PROSSER, *supra* note 66, § 51.

157. See CAL. GOV'T CODE § 825.2 (1973).

158. See Kattan, *supra* note 1, at 995-1002; Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978).

no injustice on the wronged citizen. Congress appears to have taken this approach in extending governmental responsibility for the torts of federal law enforcement officials.<sup>159</sup> It remains to be seen whether Congress or the Court will take a similar approach to the sovereign immunity of states and their subdivisions.<sup>160</sup> Until then, official immunity will remain an unfair allocation of burdens.

*Scheuer's* more flexible approach to immunity commends itself as good policy even less than does the *Imbler* doctrine. The open-ended, amorphous inquiry into reasonableness and good faith mandated in *Scheuer* provides no sure protection for the public official. On the whole, he will probably win more lawsuits than he will lose.<sup>161</sup> But the test inherently carries an element of uncertainty not present in *Imbler* and might encourage settlement without trial or might even lead to liability in cases which would be summarily dismissed under *Imbler*. Moreover, although the public official's interest is considerably impaired, the citizen gains little real benefit. Unless he can effectively rebut claims of reasonableness and good faith, he will suffer uncompensated losses. The injustice of unredressed deprivations of civil rights seems particularly senseless when the public official has no assurance of immunity.

There is a more subtle disadvantage of *Scheuer* which may be felt over the passage of time if the Court should settle upon *Scheuer's* formulation of immunity doctrine. Traditionally, the tort suit not only has compensated the wronged citizen and deterred the public official, but also has fleshed out the governing principles of constitutional law. This declaratory function of the tort suit may be impaired under *Scheuer*. If the official, ultimately, need not act within the law, but only within a good faith, reasonable understanding of the law, the courts may be able to sidestep authoritative resolution of difficult or doubtful legal questions.<sup>162</sup>

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159. See *Norton v. Turner*, 427 F. Supp. 138 (E.D. Va. 1977).

160. Whether Congress or the Court may impose such liability is a substantial topic beyond the bounds of this article. Compare *Monroe v. Pape*, 365 U.S. 167 (1961), with *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

161. See Newman, *supra* note 158, at 460-61.

162. Consider *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974), in which wrongful death damages were denied because the previously unchallenged existence of the state statute in question was thought to establish a good faith defense. Only the additional prayer for declaratory relief was thought to force the court to confront the constitutionality of the statute in question. And in this regard the Supreme Court later reversed the Eighth Circuit, ruling that declaratory relief was inappropriate. *Ashcroft v. Mattis*, 431 U.S. 171 (1977).

*Wood's* seemingly stricter interpretation of reasonableness can be taken as a change from traditional notions on accountability in one major respect. As we saw earlier, the test, in the context of the facts of the case, appears to allow little leeway for official error, especially on questions of law, and maintains a stringent standard of official accountability. This rigidity poses no serious threat to wronged plaintiffs, but surely precludes peace of mind for the government official. Indeed, the opinion seems to leave open liability for conduct which is normally lawful, but which may be converted into unlawful conduct if the plaintiff can show actual ill-will or bad motivation for the challenged conduct. Curiously, this would represent adoption of the very doctrine rejected in *Spalding*. This theory of liability carries the broadest possibility of liability and resultant debilitating effects on the public official, and yet for no compelling reason it retains small pockets of non-liability.

#### CONCLUDING OBSERVATIONS

At this point the Court's dilemma must seem insoluble. It wants immunity, but not too much. Its problems with the statutory interpretation mirror a more fundamental contrariety of disposition. It wants constitutional protections for the citizens, even some newly found protections,<sup>163</sup> but cannot always bear to direct the sting of those rights at the government officials who deny them.<sup>164</sup> If it could direct that sting at the governmental employer, it would probably show much less fascination with circumventing the "every person" language. Efforts to deal with this problem through the use of immunity doctrine have utterly failed. If the Court insists upon retaining *Tenney*, it should return to the original conception of the case: protection of immunities well-known to the 1871 Congress. This task may seem artificial and distasteful, unworthy of a Court so identified with creative leadership; but the alternative has already proven itself more unsatisfying.

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163. *Scheuer* expanded the basis of liability while creating a new immunity doctrine. Consider also *O'Connor v. Donaldson*, 422 U.S. 563 (1975), in which the Court expanded liability, but remanded for a new trial in light of *Wood*. Perhaps there is a parallel here with the Court's development of prospective-only application of constitutional rights in criminal cases. The prospective application doctrine has been argued to permit the development of new rights which the Court would be reluctant to develop if full application were given. See Haddad, "Retroactivity Should Be Rethought": A Call for the End of the Linkletter Doctrine, 60 J. CRIM. L.C. & P.S. 417 (1969).

164. Compare *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23 (1975) with *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975).



